No. 92-1500

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PAUL CASPARI, Superintendent of the Missouri Eastern Correctional Center, and JEREMIAH (JAY) NIXON, Attorney General of Missouri,

Petitioners,

v.

CHRISTOPHER BOHLEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE COOK COUNTY STATE'S ATTORNEY'S OFFICE IN SUPPORT OF PETITIONERS, PAUL CASPARI, SUPERINTENDENT OF THE MISSOURI EASTERN CORRECTIONAL CENTER, AND JEREMIAH (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI

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INTEREST OF AMICUS CURIAE

Amicus curiae, the Cook County State's Attorney's Office, is an entity responsible for a vast amount of criminal prosecutions in the State of Illinois. The State of Illinois has enacted various noncapital sentencing schemes comparable to the noncapital sentencing scheme at issue in

the instant appeal. With this cause, this Court is asked to decide whether the double jeopardy principles enunciated in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) should be extended into the realm of noncapital sentencing. Thus, the Amicus has a compelling interest in the outcome of this appeal due to the impact it may have upon criminal prosecutions in Cook County, Illinois.

Moreover, the petitioners and the several States submitting an Amici curiae brief in this cause attack the propriety of this Court's decision in *Bullington* itself. With this position the instant Amicus concurs and hereby adopts the arguments on this point set forth in the petitioners' and Amici's briefs. Thus, for this reason also, the Amicus submits that its interest in the outcome of the instant appeal is compelling.

SUMMARY OF ARGUMENT

With *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), this Court carved an extremely narrow exception to the firmly rooted general rule that the Double Jeopardy Clause does not operate to bar the imposition of a higher sentence upon remand. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969); *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). The "*Bullington* exception," however, is limited to the capital sentencing arena. This Court itself, in *Lockhart v. Nelson*, 488 U.S. 33, 37, n. 6, 109 S.Ct. 285, 289, n. 6, 102 L.Ed.2d 265 (1988), has expressly left open the question of whether

the principles of double jeopardy should be further extended to operate within the realm of noncapital sentencing proceedings. The Eighth Circuit Court of Appeals erroneously found that, "[a]fter *Bullington*, it is a short step to apply the same double jeopardy protection to a noncapital sentencing hearing as [this Court] applied to a capital sentence enhancement hearing." *Bohlen v. Caspari*, 979 F.2d 109, 113 (8th Cir. 1992). Rather, double jeopardy jurisprudence, logic and sound public policy teach that this "short step" is a quantum leap that should not be taken.

The jurisprudence of this Court teaches that convictions and acquittals receive far different treatment than sentences under the Double Jeopardy Clause. Prior to *Bullington*, the double jeopardy bar operated in the context of sentencing solely to prevent "multiple punishment." *Pearce*, 395 U.S. at 717; *DiFrancesco*, 449 U.S. at 137-138. However, in 1981, with *Bullington*, this Court extended the type of double jeopardy protection to capital sentencing which theretofore had only been applicable in the conviction/acquittal context: the "implied acquittal/lesser included offense" concept. In *Bullington*, this Court treated the imposition of a life sentence as a "lesser included offense" of the death penalty (*See Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)), a double jeopardy notion that this Court had declined to employ in the noncapital sentencing context only one year earlier in *DiFrancesco*. The elemental distinction between these two cases is the fact that *Bullington* dealt with a capital sentencing scheme while *DiFrancesco* dealt with a noncapital sentencing scheme. Thus, *Bullington* represents a policy decision on the part of this Court to extend double jeopardy protections to capital offenders that are not extended to noncapital offenders.

This "disparate treatment" given to capital offenders is not new in this Court's jurisprudence. For example, this Court flatly refused to extend to noncapital sentencing proceedings the Eighth Amendment proportionality review operative in the context of capital sentencing proceedings solely because of "the unique nature of the death penalty." *Rummel v. Estelle*, 445 U.S. 263, 273, 100 S.Ct. 1133, 1138, 63 L.Ed.2d 382 (1980). So too, in the double jeopardy context, the qualitative and quantitative difference between death and all other noncapital sentences explains why the protection afforded capital offenders in *Bullington* should not be extended to noncapital offenders.

Moreover, the analogy utilized in *Bullington* only operates logically within a capital sentencing scheme and breaks down if forced into the noncapital sentencing arena. With *Bullington*, this Court analogized the imposition of a life sentence to a "lesser included offense" of the death penalty. This perfect fit can be found only in the context of capital sentencing. With noncapital sentencing schemes, e.g., the enhanced sentencing scheme at issue in the instant cause, the sentencing alternatives are many: either defendant receives the enhanced sentence or his sentence is one within a range of sentences. Thus, the very analogy by which this Court engrafted double jeopardy protections afforded at trial onto a capital sentencing scheme cannot be the same vehicle by which these protections are transferred to the noncapital sentencing arena.

Finally, the policy implications of extending the *Bullington* double jeopardy protections to noncapital sentencing are alarming. To date, there is a clear line of demarcation between capital and noncapital sentencing in terms of double jeopardy. Thus, there exists a uniform administration of this aspect of the Constitution throughout the nation. Application of *Bullington* to noncapital sentencing proceedings could obtain varying results from State to State, depending on the degree of similarity the particular sentencing scheme bears to the scheme at issue in *Bullington*. Moreover, a State could very easily manipulate its noncapital sentencing schemes, to the detriment of its noncapital offenders. In order to circumvent the application of double jeopardy principles, a State need only eliminate certain substantive and procedural protections currently afforded its noncapital offenders. Because the State need not be placed in this "catch 22" and because constitutional protections should be extended uniformly, a clear line of demarcation between capital and noncapital sentencing schemes should be drawn by this Court in the context of the Double Jeopardy Clause. Should this Court not accept the invitation to reassess the propriety of *Bullington* itself, this Court should limit the application of *Bullington* to the capital sentencing arena.

ARGUMENT

WHETHER DOUBLE JEOPARDY PROTECTIONS AFFORDED AT CAPITAL SENTENCING PROCEEDINGS SHOULD BE EXTENDED INTO THE NONCAPITAL SENTENCING ARENA.

This Court must now decide whether the double jeopardy bar operative in the capital sentencing context (*See Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed. 2d 270 (1981)) should be also extended to the noncapital sentencing arena. This Court's jurisprudence teaches that, at the very least, double jeopardy protections are parceled out differently between the sentencing and trial context. With *Bullington*, for the first time, this Court engrafted

the trial-type concept of lesser included offenses onto a capital sentencing scheme. The Eighth Circuit Court of Appeals, in the instant cause, has erroneously extended this notion to a noncapital sentencing scheme.

"Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Breed v. Jones*, 421 U.S. 519, 528, 95 S.Ct. 1779, 1785, 44 L.Ed.2d 346 (1975). The prohibition against multiple trials has been said to be the "controlling constitutional principle." *United States v. Wilson*, 420 U.S. 332, 346, 95 S.Ct. 1013, 1023, 43 L.Ed.2d 232 (1975). This is bottomed in the primary purpose of the Clause, which is to preserve the finality of judgments. *Crist v. Bretz*, 437 U.S. 28, 33, 98 S.Ct. 2156, 2159, 57 L.Ed.2d 24 (1978). Generally, however, sentences do "not have the qualities of constitutional finality that attend an acquittal." *United States v. DiFrancesco*, 449 U.S. 117, 133, 101 S.Ct. 426, 433, 66 L.Ed.2d 328 (1980). Prior to *Bullington*, the only double jeopardy protection afforded in the sentencing context was the prohibition against multiple punishments. *See North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). *Bullington* represents a limited departure from the clear line between sentencing and trial; but, the Eighth Circuit Court of Appeals failed to recognize that this departure is limited solely to capital sentencing.

In *DiFrancesco*, this Court addressed a double jeopardy challenge to the Organized Crime Control Act of 1970, a noncapital sentencing provision. The Act authorized the imposition of an increased sentence upon a convicted "dangerous special offender" and granted the government, under specified conditions, the right to appeal the sentence imposed. *DiFrancesco*, 449 U.S. at 118-120. Necessarily, concomitant with the government's right to appeal is the

right, should the appeal prove successful, to obtain a higher sentence.

Defendant, however, attempted to invoke double jeopardy protection by lifting the double jeopardy principles operative at trial and, for the first time, apply them in the sentencing arena. Defendant *analogized* the imposition of his particular sentence to the conviction of a lesser included offense and the consequent "implied acquittal" of any greater sentence. *DiFrancesco*, 449 U.S. at 133-134. This Court reviewed its pertinent rulings (449 U.S. at 134-136), the history of sentencing practices (449 U.S. at 133-134), and the considerations of double jeopardy policy (449 U.S. 136-137). After analyzing these sources, this Court declined to engraft defendant's trial-based "implied acquittal/lesser included offense" analogy onto the noncapital sentencing scheme. Because of the "fundamental distinctions between a sentence and an acquittal" (449 U.S. at 133), this Court concluded that defendant's sentence was not to be accorded "constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal." *DiFrancesco*, 449 U.S. at 132. Thus, in *DiFrancesco*, this Court clearly drew a double jeopardy line between sentencing and convictions/acquittals, thereby reaffirming the general rule that the double jeopardy principles operative at trial are not transferable to the sentencing arena.

One year later, however, in 1981, this Court deigned to extend double jeopardy principles to a Missouri *capital* sentencing hearing through the very vehicle earlier rejected in *DiFrancesco*: the "implied acquittal/lesser included offense" analogy. *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). This Court recognized the general rule to be that "[t]he imposition

of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed." 451 U.S. at 438. Nonetheless, unlike any of the *noncapital* sentencing proceedings previously considered by this Court, the capital sentencing procedure in Missouri "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence." 451 U.S. at 438. Thus, the extension of trial-type notions of double jeopardy into this sentencing arena was facile.

The framework of the capital sentencing scheme at issue in *Bullington* lent itself perfectly to the very "implied acquittal/lesser included offense" analogy earlier rejected in *DiFrancesco*. The jury was ***explicitly required*** to determine whether the prosecution had "proved its case" that defendant deserved the death penalty. (emphasis in original) 451 U.S. 444. Missouri's capital sentencing provision afforded the jury two, and only two, definite sentencing alternatives: death or a life sentence. 451 U.S. at 432. The jury affirmatively decided to impose the lesser life sentence, which operated as an "implied acquittal" of the greater sentence of death. 451 U.S. 443-445; *See* 451 U.S. at 447-453 (Powell, J., dissenting). Thus, the *Bullington* Court extended trial-type double jeopardy protection to a capital sentencing proceeding by utilizing the very *analogy* it declined to adopt in the *DiFrancesco noncapital* sentencing context.

Subsequent to *Bullington*, this Court has limited its application of the *Bullington* "implied acquittal/lesser included offense" analogy to capital sentencing proceedings. In *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), the sentencing court, in reliance upon an error of law, imposed a life sentence pursuant to Arizona's capital sentencing scheme. The Court determined that the "acquittal" of the death sentence, therefore, was final, despite the fact that it was premised upon legal error. 467 U.S. at 211.

Two years after *Rumsey*, this Court again applied the "implied acquittal/lesser included offense" analogy to a capital sentencing proceeding. *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). However, here this Court recognized that the extension of trial-type double jeopardy protections even into the capital sentencing context was logically limited. In *Poland*, the reviewing court found that there was insufficient evidence to support the "especially heinous, cruel or depraved" aggravating factor upon which the imposition of defendants' death sentences were based. The reviewing court, however, found that there was sufficient evidence to support the "pecuniary gain" aggravating factor upon which the sentencing court did not rely. On remand, defendants were again sentenced to death on the basis of, *inter alia*, the pecuniary gain aggravating factor. This Court rejected defendants' argument that the reviewing court's finding of insufficient evidence regarding the "especially heinous, cruel or depraved" aggravating factor constituted an "acquittal" of the death penalty (476 U.S. at 157), reasoning that:

> "*Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case' that the death penalty is appropriate. (footnote omitted) We are not prepared to extend *Bullington* further and view the capital sentencing hearing as a set of mini-trials on the existence of each aggravating circumstance. Such an approach would push the analogy on which *Bullington* is based past the breaking point." 476 U.S. at 155-156.

Thus, this Court itself has recognized that the *entire* double jeopardy jurisprudence, developed in the context of a trial, cannot be superimposed upon the framework of even a capital sentencing hearing. The "implied acquittal/lesser included offense" analogy was selectively lifted from its historical foundation in the trial context and forcefully injected into the realm of capital sentencing. This selective use of double jeopardy reflects a sheer policy decision to extend double jeopardy only to capital sentencing.

The double jeopardy jurisprudence of this Court teaches that *Bullington* and its "implied acquittal/lesser included offense" analogy represent a narrowly circumscribed extension of double jeopardy protections to the sentencing context. With *Bullington*, this Court has drawn its line of demarcation at *capital* sentencing. This Court has never extended the *Bullington* "implied acquittal/lesser included offense" analogy to noncapital sentencing proceedings. *See Lockhart v. Nelson*, 488 U.S. 33, 37, n. 6, 109 S.Ct. 285, 289 n. 6, 102 L.Ed.2d 265 (1988) (Because the State of Arkansas conceded the issue, this Court assumed, without deciding, that the *Bullington* analogy extended to noncapital sentencing proceedings.); *Hunt v. New York*, ____ U.S. ____, 112 S.Ct. 432, 116 L.Ed.2d 452 (1991) (White, J., dissenting from the denial of a petition for *certiorari*.) (Dissent makes it clear that the application of double jeopardy to noncapital sentencing proceedings is still an open issue.). Quite simply, noncapital sentencing proceedings do not afford a framework within which the *Bullington* "implied acquittal/lesser included offense" analogy can operate. As Justice Brennan noted in his dissent from the denial of a petition for *certiorari* in *Sorola v. Texas*, 493 U.S. 1005, 110 S.Ct. 569, 107 L.Ed.2d 563 (1989):

> "To be sure, *Bullington* and *Rumsey* relied on the fact that the sentencer had determined after a trial-like hearing that the evidence was insufficient to impose the death penalty * * * * But the significance of the presence of a trial-like proceeding was that it distinguished a capital case from the noncapital sentencing context, where the imposition of a particular sentence is not an implied acquittal of a greater sentence. (citation) The Court justified an exception to the general rule because of the unique features of the capital sentencing scheme where the state bears the burden of proving, often beyond a reasonable doubt, that death is the appropriate penalty." 493 U.S. at 1008.

Application of this "implied acquittal/lesser included offense" analogy to noncapital sentencing proceedings, therefore, would "push the analogy past the breaking point," something this Court declined to do even in the more apt context of capital sentencing.

More importantly, the *Bullington* Court itself made it clear that its use of the "implied acquittal/lesser included offense" analogy served as a vehicle through which to graft traditional double jeopardy principles onto capital sentencing proceedings. This Court took great pains to note that *Bullington* represents a departure from the general rule that double jeopardy protection does not operate in the context of sentencing. The *Bullington* Court justified this departure, in part, on the grounds that capital sentencing shares the same values that underlie the absolute finality accorded a verdict of acquittal on the issue of guilt or innocence. 451 U.S. at 445. The Court stated that:

> "The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced

> by any defendant at the guilt phase of a criminal trial. The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' (citation) thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment." 451 U.S. at 445.

These values are not present in the noncapital sentencing context. It can hardly be said that the "anxiety and insecurity" inherent in a capital sentencing proceeding is equivalent to that felt by a defendant at a noncapital sentencing hearing. The defendant facing capital sentencing stands convicted of capital murder. "The punishment of death is part and parcel of the substantive offense of capital murder." *See People v. Sailor*, 480 N.E.2d 701 (N.Y. 1985), *cert. denied*, 474 U.S. 982 (1985). Thus, a capital sentencing proceeding integrally involves a redetermination, in the form of aggravating and mitigating factors, of the manner in which the underlying murder was committed. The capital sentencing defendant, thus, has a chance of being "acquitted" of *capital* murder and having his "conviction" reduced to *noncapital* murder should the sentencing body opt not to impose the death sentence. The noncapital sentencing defendant simply is not afforded such an opportunity. The noncapital sentencing hearing depends, in large part, upon straightforward, objective record evidence of a defendant's criminal past such as "rap" sheets, certified copies of conviction, and presentence investigation reports. The noncapital sentencing proceeding is not part and parcel of any substantive offense. Thus, a noncapital sentencing defendant does not feel the "anxiety and insecurity" of being "convicted" or "acquitted" of his substantive offense by the sentencing body.

The policy determination to draw the line of demarcation for extension of double jeopardy protections at capital sentencing proceedings is justifiable because the "imposition of death by public authority is so profoundly different from all other penalties." *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). This Court has demonstrated its willingness to limit Eighth Amendment proportionality review solely to capital sentencing proceedings based upon the "unique nature of the death penalty." *Rummel v. Estelle*, 445 U.S. 263, 273, 100 S.Ct. 1133, 1138, 63 L.Ed.2d 382 (1980). The *Rummel* Court explained:

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." 445 U.S. at 263, citing *Furman v. Georgia*, 408 U.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972).

In *Rummel*, and again in *Harmelin v. Michigan*, 501 U.S. ____, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), this Court declined to extend the constitutional protection of proportionality review to noncapital sentences. The *Harmelin* Court explained, "Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides." 111 S.Ct. at 2701.

Similarly, with *Bullington*, this Court has afforded special treatment to capital offenders, carving a narrow exception to the general rule, manifested in *DiFrancesco*, that trial-type principles of double jeopardy do not apply to the imposition of sentences. This is so because of the

qualitative and quantitative difference between death and all other noncapital sentences. *See Sawyer v. Whitley*, 945 F.2d 812, 818-819 (5th Cir. 1991), *cert. granted*, 112 S.Ct. 434 (1991). The double jeopardy jurisprudence of this Court teaches that noncapital sentencing proceedings are governed by the *DiFrancesco* general rule and capital sentencing proceedings are governed by *Bullington*. Thus, the Eighth Circuit Court of Appeals' decision to extend *Bullington* to noncapital sentencing proceedings was error. *See Denton v. Duckworth*, 873 F.2d 144 (7th Cir. 1989) *cert. denied*, 493 U.S. 941 (1989), *Linam v. Griffin*, 685 F.2d 369 (10th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983); *Cf. French v. Estelle*, 692 F.2d 1021 (5th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983).

Moreover, as stated above, the application of constitutional principles should obtain from State to State in a uniform manner. Should this Court decline to reconsider the propriety of *Bullington* itself, a State could very easily manipulate its sentencing schemes to avoid the operation of the Double Jeopardy Clause. Because *Bullington* rests upon an assessment of the substantive and procedural safeguards afforded by the sentencing scheme, to avoid application of *Bullington* double jeopardy principles, a State need only tamper with these safeguards so as to limit its sentencing scheme's likeness to the scheme at issue in *Bullington*. Clearly, this would operate to the detriment of the criminal defendants and places the State itself in the unenviable position of choosing between these safeguards and the Double Jeopardy Clause. For these reasons, extension of *Bullington* to the noncapital sentencing realm amounts to nothing less than bad policy.

As stated above, the Amicus hereby adopts the position of the petitioners and the Amici and requests that this Court reconsider the propriety of *Bullington* itself.

Should this Court decline this invitation, for the foregoing reasons, the Amicus respectfully contends that *Bullington*-type double jeopardy protections should be reserved to capital sentencing and not be extended into the realm of noncapital sentencing.

CONCLUSION

Amicus curiae respectfully requests that this Honorable Court reverse the decision of the Eighth Circuit Court of Appeals.

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